In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-255

NATIONAL AMERICAN BANK OF NEW ORLEANS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States commenced this action in the United States District Court for the Eastern District of Louisiana under 49 U.S.C. 782, seeking forfeiture of an automobile used to transport heroin, in violation of 49 U.S.C. 781. Petitioner intervened in the proceeding as holder of a chattel mortgage and vendor's lien on the car, which it had obtained as security for a loan made to the owner of the vehicle; the owner's husband had used the car to transport the heroin.

Petitioner alleged that it was innocent of any wrongdoing and had applied to the Attorney General, under 19 U.S.C. 1618, for remission of the forfeiture to the extent of its interest in the car. It sought re-

476-133—72— 1

view of the Attorney General's denial of remission and interposed a counterclaim seeking recovery under the Tucker Act, 28 U.S.C. 1346(a)(2).[1] The district court denied relief on the ground that the decision of the Attorney General whether to grant remission under 19 U.S.C. 1618 is a matter committed to the sole discretion of the Attorney General, and, once exercised, is not subject to judicial review.[2] The court of appeals affirmed (Pet. App. A 1–5).[3]

Petitioner's contentions in this Court that the Attorney General's determination is reviewable, and that the refusal to remit in this case denied its Fifth Amendment right to just compensation, are fully answered in the opinion below on which we principally rely here.

We note additionally that the Administrative Procedure Act, in providing for judicial review, is expressly inapplicable to agency action "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Remission of forfeiture is such discretionary action.

---

[1] According to petitioner (Pet. 4), the Attorney General predicated his denial on the failure of petitioner to comply with the regulations requiring a lender first to make inquiry from a law enforcement agency of the character of the borrower (28 C.F.R. 9.1–9.7). Any subsequent change in the regulations (Pet. 4) would not excuse petitioner's non-compliance with the regulation in effect at the time.

[2] It is recognized that where the Attorney General fails to exercise his discretion at all, the courts may intervene (Pet. App. A 4).

[3] The court of appeals denied a petition for rehearing (Pet. App. B), rejecting petitioner's claim that *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719–721, is in conflict with the court's decision.

On the just compensation point, we add the following comments: While, as lienholder, petitioner was technically the legal owner of the vehicle, its interest was reversionary only; the vehicle served as security for the debt owed to it by the purchaser. The forfeiture did not extinguish this debt since, despite losing possession of the vehicle, the purchaser is still liable under the contract. It is this continuing liability, in fact, which gives the forfeiture statute its impact. See *United States* v. *One 1941 Pontiac Sedan*, 83 F. Supp. 999, 1000–1001 (S.D.N.Y.). When a forfeited vehicle is remitted to a lienholder, the purchaser's debt is thereby satisfied and his only loss is his equity in the vehicle—frequently minimal due to the vehicle's depreciation. Petitioner's real contention is thus that its claim against the vehicle as satisfaction of the purchaser's debt should be afforded legal precedence over the government's forfeiture claim. It is not a violation of the Fifth Amendment to deny a lienholder that precedence, especially where, as here, it failed to make the necessary inquiries when the debt was contracted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972